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Supreme Court of the United States

OCTOBER TERM, 1956

No. 391

SAMUEL LEISER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The undersigned on behalf of Samuel Leiser of New York, New York prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on June 13, 1956, affirming a decree entered January 31, 1956 by the United States District Court for the District of Massachusetts.

Opinion Below

The opinion of the District Court is printed in the Record at pages 68 to 70; and the decree of the District Court is printed in said Record at pages 71 and 72. The opinion is also reported, 137 F. Supp. 527. The opinion of the Court of Appeals for the First Circuit is not yet officially reported; but is printed in the Appendix hereto, (App. B, pp. 43-47, as well as at pages 75-79 of the Record.

Jurisdiction

The opinion of the District Court granted a motion of the United States for summary judgment; and was dated January 19, 1956. The decree thereon was dated January 31, 1956. The opinion and decree of the Court of Appeals affirming the District Court decision were each dated June 13, 1956.

No order respecting a rehearing in the Court of Appeals, and no order granting an extension of time within which to petition for certiorari, has been either requested or granted; but a stay of mandate pending application to this Court for a writ of certiorari was granted by the Court of Appeals on June 21, 1956. (R. p. 80)

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (28 U.S.C. 1254).

Questions Presented

I.

Whether the involuntary entry of merchandise into the United States because of wreck, distress, weather conditions, or vis major does not exempt such merchandise from the Customs laws and regulations and other local laws of the United States, unless, after said merchandise arrives here, the owner or consignee elects to have it remain here.

II.

Whether, apart from the claim of exemption based on involuntary entry, the Court below erred in the interpretation of U. S. Customs laws and regulations.

(a) As to regulation 10.19 (19 C.F.R. 10.19) being valid, or invalid as beyond the power of the Secretary of the Treasury, when applied to a non-arriving person.

(b) As to the meaning of the word "arriving" in 19 U.S.C. 1496-1498.

(c) As to the proper concept of entry and declaration under Customs statutes.

III.

Whether the libel sets forth a cause of action.

IV.

Whether the present proceedings for alleged violation of Title 19, United States Code, §§ 1497 and 1498, and regulations prescribed thereunder, are violative of the double jeopardy clause of the Fifth Amendment, because the petitioner was indicted, tried and acquitted of the same charge in Count 2 of criminal indictment 54-190-A in the United States District Court for the District of Massachusetts.

V.

Whether the search and seizure in the present case has deprived the petitioner of the benefits of the "unreasonable searches and seizures" provision of the Fourth Amendment and the "due process of law" provision of the Fifth Amendment to the United States Constitution. If such deprivation is not clear on the record, petitioner has been prevented from developing the facts on which it is based.

Constitutional Provisions, Statutes, and Regulations Involved

The constitutional provisions involved are the Fourth and Fifth Amendments to the United States Constitution, which are printed in the Appendix (App. A, p. 37).

The Statutes most directly involved are Title 19 United States Code, §§ 1496, 1497, and 1498 (a) (6). They are printed below.

§ 1496. *Examination of baggage*

The collector may cause an examination to be made of the baggage of any person arriving in the United States in order to ascertain what articles are contained therein and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry therefor has been made. (June 17, 1930, c. 497, Title IV, § 496, 46 Stat. 727.)

§ 1497. *Same; penalties*

Any article not included in the declaration and entry as made and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article. (June 17, 1930, c. 497, Title IV, § 497, 46 Stat. 728.)

§ 1498. *Entry under regulations—Authorized for certain merchandise*

(a) The Secretary of the Treasury is authorized to prescribe rules and regulations for the declaration and entry of

(6) Articles carried on the person or contained in the baggage of a person arriving in the United States;

Also involved are Title 18, United States Code 545, Title 19 United States Code 1442, 1484(a), 1485(a), 1615, 1624, which are printed in the Appendix (App. A, pp. 37-40).

Paragraphs (a) (b) (c) of Regulation 10.19 (19 C.F.R. 10.19) are also printed in the Appendix (App. A, pp. 41-42).

Statement of the Case

These are forfeiture proceedings instituted by the United States of America against 532.33 carats, more or less, of cut and polished diamonds. The bare bones of the facts are chronologically stated in the three following paragraphs.

The petitioner, Samuel Leiser, on June 5, 1954, purchased at the T.W.A. office in Frankfurt, Germany, air transportation as follows:

From Frankfurt to Paris
From Paris to Gander, Newfoundland
From Gander to Montreal, Canada
From Montreal to Bermuda

On June 6, with the diamonds in question on his person, the petitioner flew from Frankfurt to Paris, where he boarded a T.W.A. plane from Rome to New York, which had scheduled stops in Switzerland, and at Paris, Shannon, Gander and Boston. The plane was unable to land at Gander because of adverse weather; and petitioner was overflown to Boston, Massachusetts, where the plane landed about 4.30 a.m. on June 7, 1954.

Immediately on landing and while in the Customs enclosure, but before any contact with Customs Officers, he made arrangements with T.W.A. to fly him back to Canada on another airline, but at T.W.A. expense. With full knowledge of these facts, customs officials at Boston approached him and insisted on searching him; and refused

to allow him to fly back to Canada on transportation furnished by T.W.A., either on a 7 a.m. plane to Montreal or a 9 a.m. plane to Halifax, on the morning of June 7, 1954.

Instead, they arrested him and indicted him in two counts. Count 1 charged that he did knowingly and willfully with intent to defraud the United States smuggle and clandestinely introduce into the United States certain diamonds which should have been invoiced. Count 2 charged that he fraudulently and knowingly imported and brought into the United States certain diamonds contrary to law

> "in that said merchandise was not included in the declaration and entry as made and was not declared either orally or in writing before the examination of his baggage was begun, as required by the provisions of 19 U.S.C. 1497 and 1498 and regulations prescribed thereunder;".

After a prolonged trial in January of 1955 before Aldrich, J. and a jury, in which the defendant Samuel Leiser took the stand and testified, he was found not guilty on both counts of the indictment.

Subsequently, on February 24, 1955, the present forfeiture proceedings were instituted.

It is unfortunate that all the detailed facts and evidence developed during the trial of the criminal indictment are not in the present record. However, by reason of requests for admissions filed by the petitioner, and the responses of the United States thereto, and by reason of answers to interrogatories, certain important facts are in the present record. (References below, such as "A1, A2, A3" etc., indicate admissions by the United States in response to requests of the petitioner for admissions of material facts.)

The facts above stated, as to the petitioner's purchase of air transportation from Frankfurt to Paris to Gander

to Montreal to Bermuda, are admitted by Admission 2 (R. pp. 23, 42). The route and scheduled stops of the T.W.A. plane boarded by the petitioner at Paris, France, are covered by Admission 3. The fact that the plane overflew Gander "because of adverse weather conditions" about 11:30 to midnight on June 6, 1954; that thereafter he could not leave the plane until it arrived at Boston; and that, therefore, the petitioner was landed at Boston because of adverse weather conditions and vis major, are covered by A4, A5, and A7 (R. pp. 23, 24, 42, 43).

After the plane left Shannon, the petitioner and other Gander passengers were advised that there was no necessity for them to make out U. S. Customs declarations (A10, R. pp. 24, 43); but at or shortly after Gander was overflown, the purser distributed U. S. Customs forms to petitioner and other overflown Gander passengers, and told them to sign them (A11, R. pp. 24, 25, 43). In each of the forms then so delivered the purser wrote out in said form under the heading "Description of Articles (Articles obtained for use of and accompanying passengers)" the words "Gander, Passenger . . . Overflew . . . IN TRANSIT" (A12, R. pp. 25, 43). One of said forms was signed by the petitioner and picked up and retained by the purser on board the plane (A8, A14, R. pp. 24, 25, 43). When so signed, no articles were declared in it. All that had been filled out was in the handwriting of the purser except the correction of the petitioner's last name from "Leisen" to "Leiser," the initials U.S.A., and the signature of the petitioner at the bottom right. A photostat of this form, marked "A", appears at Page 35 of the Record. All other writing shown in said photostat was filled in by officers of the United States Customs and of the United States Department of Agriculture at Logan International Airport, Boston, after the airplane landed at Boston and the petitioner's baggage and said Customs form were turned over to the United

States Customs by personnel of the airline, (A8, A14, A15, R. pp. 24, 25, 26, 43, 44). Explicit details, as to who wrote what in said form, are stated in A15.

When the T.W.A. plane overflew Gander, the petitioner "insisted on returning to Canada by the first available transportation, and, before any Customs official in Boston approached him, he made arrangements to that effect with a commercial airline company at Boston." (See findings of fact of District Court, R. p. 69; see also A17, R. pp. 26, 27, 45).

As to the existence of flights from Boston to Canada at 7 a.m., 9 a.m. and 11 a.m. that morning, see A29 (R. pp. 29, 30, 46). T.W.A. provided reservations and transportation to the petitioner and another passenger, Hanhart, for both the 7 a.m. plane and the 9 a.m. plane (See A31, A32, and A33, R. pp. 30, 47). The United States Immigration Service insisted that Hanhart board said 9 a.m. plane to Halifax (A34); but the United States Customs agents refused to allow petitioner to board the same plane (A35, R. pp. 30, 47).

The cut and polished diamonds carried by petitioner were not subject to any Customs import duty in Canada on June 6 or 7, 1954 (A28; R. pp. 29, 46).

Before any United States Customs agents met or talked with the petitioner, they had in their possession information from the manifest of T.W.A. plane that the petitioner was a passenger scheduled to deplane at Gander; from T.W.A. or other sources they had information that the flight overflew Gander because of adverse weather conditions; and from the Customs form signed by the petitioner, they had information that he was a "Gander Passenger . . . Overflew . . . In Transit" (A9, R. pp. 24, 43). After the plane landed at Boston, the petitioner was always in an enclosure under the control of the United States until he was taken from the airport by Customs agents. (A18 and A23 (a), (b),

and (c), R. pp. 27, 28, 29, 45, 46). At no time did petitioner commit any act indicating that he attempted to remove himself from Customs observations or surveillance (first sentence of A19, R. pp. 27, 45). In conversations with Customs agents at the airport that morning, petitioner stated his intention to return to Gander; told them he did not intend to come to the United States; that he intended to proceed by the first transportation available to Canada in general and Newfoundland in particular; and that he and a fellow passenger named Hanhart had an appointment in Newfoundland on the night of June 7, 1954 (A20, A22, (a), (b) and (c), R. pp. 27, 28, 45, 46). In various conversations he had with Custom agents on June 7 petitioner never stated that he desired to proceed to any place other than Canada (Interrogatory 6, R. pp. 52, 61).

As to the indictment and acquittal of the petitioner, A38 admits that Exhibit "B" (R. p. 37) annexed to the claimant's Request for Admission of Relevant Facts is a copy of the indictment in question; A40 admits in substance that Count 2 of said indictment charges the same offense that is stated in the present forfeiture libel; and A41 admits that the petitioner was tried and acquitted on both counts of said indictment (R. pp. 31, 47).

The present action was instituted by the United States as a libel for forfeiture, 28 U.S.C. 1355.

Petitioner filed a motion for summary judgment (R. pp. 18-21) which was denied by the District Court (R. p. 21).

Libellant filed a motion for summary judgment (R. p. 65), which was granted (R. p. 70).

Petitioner's notice of appeal to the Court of Appeals (R. p. 73), appealed from the orders and decrees of the District Court, denying and allowing said respective motions for summary judgment, and also from certain other orders therein referred to concerning interrogatories and requests for admissions of fact.

Argument on Reasons for Granting Writ

There are special and important reasons for the court to exercise its sound judicial discretion and to grant the writ of certiorari prayed for in this petition on each of the questions presented.

Argument is made on each of the questions presented as set forth on pages 2, 3 of this petition; and, in the interests of brevity, the questions presented are not repeated as a caption for each subdivision of this argument, but are referred to by number.

Question No. I

As to the question of an exemption resulting from involuntary entry, there are three reasons why the writ should be granted.

(a) The decision below, in denying exemption to the goods involuntarily brought here, has decided an important question of Federal law (and perhaps of international law) in a way in conflict with the applicable decisions of this Court and of the courts of appeal and district courts in several circuits concerning involuntary arrival by ship (no applicable decisions as to airplanes being found);

(b) That insofar as the involuntary entry of the petitioner, as well as his property, may be involved in the issues of this case, the decision below has decided an important question of Federal law which has not been, but should be, settled by this Court; and

(c) That the decision of the court below on the above points is in conflict with the decisions of this Court and other courts, because it does not consider the doctrine that

involuntary entry creates an *exemption from* the customs and other local laws of the United States. Instead it is based solely upon an *interpretation* of the very customs statutes and regulations from which, if the facts make out an involuntary entry, the petitioner and his property were *exempt*.

(a) The doctrine of involuntary entry is an ancient one, founded in international law, or in the "customs and usages of all civilized countries". Briefly stated, it is that goods which are brought into a country involuntarily as a result of wreck, distress, weather conditions, or vis major are exempt from the Customs laws and regulations, and other local laws, of the country into which they are involuntarily brought.

Wharton, Digest of International Law, (1886 printing, Volume 1, pp. 159-167,) under heading "Exemption from Stress of Weather, Vis Major, or Inadvertence".

Moore, International Law Digest, 1906 edition, Volume 2, section 208, p. 339 et seq., under heading "Involuntary Entrance, as Ground of Exemption"

American Jurisprudence, Volume 15, pp. 337 and 338

Hackworth, Digest of International Law, 1948 printing, Volume 2, pp. 277-281, under heading "National Jurisdiction", subheading "Jurisdiction over Ports" and sub-heading "Involuntary Entrance"

(See particularly the case of *The Creole* treated at some length in Wharton and Moore above, and the cases of the *North Atlantic Coast Fisheries*, and of

Kate A. Hoff, Administratrix, reported in Hackworth above.)

The doctrine is considerably older than is the United States; but it was adopted by, and has always been a part of, United States law.

The Mary, 16 Fed. Cases 932 (1812), Case #9183, First Circuit, vessel put into Nantasket Roads, Boston Harbor, for protection from storm; and was seized by Customs because of English goods on board in violation of Embargo Act. Both ship and cargo held exempt.

The Brig Concord, 9 Cranch 387 (1815), neutral cargo on board British ship seized by privateer during war of 1812 and brought to New York by vis major. Held that cargo would be exempt if specifically restored and taken out of United States; but subject to duties where it was sold by agreement under court order, and goods entered U. S. commerce.

The Louise F., 293 Fed. 933 (Dist. Ct., S.D. Fla., 1923)
The Przemysl, 23 F.2d 336 (Dist. Ct., E.D. La., 1927)

United States v. *Sullivan,* 26 F.2d 606 (1928) Fifth Circuit

As was said in *The Mary,* 16 Fed. Cases 932:

> "If a vessel come in by distress, or to avoid capture, it has never been considered as an importation, as to foreign ships; nor could a different rule be applied as to citizens."

No cases to the contrary have been found.

The burden of proving involuntary entry by reason of distress, weather, vis major, etc., has always been put on the party claiming the resulting exemption. It still is, 19 U.S.C. 1615. But the principle of the exemption has been acknowledged and upheld, even where the facts of distress or superior force have been held not established. As to Customs law, this is so even in cases of contraband.

> *The New York: Troup, Claimant,* 3 Wheaton 59, 68
> *The Squanto,* 13 F.2d, 548 (1926) Second Circuit

The same result was arrived at under the National Prohibition Act,—U. S. Treasury Decision 3484 approved June 2, 1923, 43 Treasury Decisions, Internal Revenue (1923) 44, 46.

> "SEC. 5. The National Prohibition Act does not apply to merchant vessels which are forced into port by stress of weather or by inevitable necessity. The involuntary entrance furnishes a ground of exemption, and, under international law, it is improper to impose fines upon vessels compelled to put into port for such reason. This rule also applies to goods on board vessels thus circumstanced. These exemptions depend, however, upon proof of the fact of the urgency of the distress."

(b) What has been said above relates only to property brought here involuntarily. How the presence of the owner with the property, where both are brought here involuntarily, would alter this result is not readily seen (unless, as hereinafter stated, he elects that the property remain here). But no case has been found in which the United States has ever even attempted to forfeit goods on the person of one involuntarily brought here. It is suggested that the reason for this is that, if the property involun-

tarily brought here was exempt from U. S. Customs laws, then the person in whose possession it was involuntarily brought here was also exempt.

(c) The result of the decision below is to deny both the doctrine of involuntary entry and the exemption resulting therefrom, although the opinion of the court below considered neither.

The exemption claimed by the petitioner for his diamonds is not an exemption *created* by United States statutes, but an *exemption from the applicability* of United States customs statutes and regulations, which is akin to the immunity extended to ambassadors of foreign countries, as defined in The Exchange, 7 Cranch 116, 136, 142.

But the Court below (R. p. 76; App. B, p. 44), while it cited the petitioner's "somewhat more substantial claim that goods involuntarily brought into the United States by wreck, distress of weather, or vis major, are exempt from customs and other local laws of the United States", did not then consider or pass upon that "more substantial claim". Instead, after reciting that contention, the opinion next quoted the statutes and regulations relied on by the government (R. pp. 76-78; App. B, pp. 44-46), and then misinterpreted petitioner's contention (R. p. 78; App. B, p. 46), as follows:

> "As we understand appellant's argument, he contends that the word "arriving" as it appears in §§ 1496 and 1498 is to be construed in a limited technical sense, under the authority of various cases involving ships which he has cited, as meaning not mere physical arrival but rather a voluntary or intentional arrival of such goods "with intent to unlade" same ***' in the United States. We cannot agree with this contention."

This is an answer (erroneous it is submitted) to a separate question of statutory interpretation, hereinafter considered, under Question II. But it does not consider or meet the contention that the doctrine of involuntary entry invoked by the petitioner is based on *exemption from*, and not *interpretation of*, U. S. customs statutes.

It is unnecessary, for the purposes of this case, to go as far as Mr. Justice Woodbury in *Harrison* v. *Vose*, 9 Howard 372, 378:

> "Thus no law of Congress could ever be properly construed as an intention to punish involuntary acts, such as what is done by force of a storm, or an enemy."

It suffices that the doctrine of involuntary entry, as shown in (a) above, always has been a part of the law of the U. S.; and that Congress has not yet attempted by statute to overrule the judicial decisions creating it.

The decision below ignored any consideration of exemptions or immunities existing apart from the statutes. It relied solely on statutory interpretation; looked only for exemptions created by statute; and ended this part of its opinion (R. p. 79; App. B, p. 47), as follows:

> "We believe the word "arriving" as it appears in relevant sections of the statute does not bear the construction for which appellant contends. We believe that § 1497 subjected to forfeiture the diamonds which appellant failed to declare regardless of the fact that he came into this country involuntarily and with no 'intent to unlade.'"

This is in conflict with the reasoning of this Court in *The Brig Concord*, 9 Cranch 387 (1815):

> "Where goods are brought by superior force, or by inevitable necessity, into the United States, they are not deemed to be so imported, in the sense of the law, as necessarily to attach the right to duties. If, however, such goods are afterwards sold or consumed in the country, or incorporated into the general mass of its property, they become retroactively liable to the payment of duties. In the present case, if the goods had been specifically restored, and afterwards withdrawn from the United States by the claimants, they would have been exempt from duties. But having been sold, by order of the court, for the general benefit, the duties indissolubly attach and ought to have been deducted from the proceeds by the court below."

There, the original entry of the goods being by vis major, they were exempt from Custom laws because brought here *involuntarily,* against the will of the owners. But when that intent was changed retroactively, the Customs laws and duties applied retroactively. Hence, intent was not immaterial, but controlling.

Question No. II

As to the second Question Presented, there are various reasons why the writ should be granted on the questions concerning the proper interpretation of several individual customs statutes and regulations relied on by the government.

But there is one reason why the writ should be granted which underlies and permeates all of these. That is, that the government and the courts below seem to conceive the purport and structure of Title 19 U.S.C. to require that all goods physically brought into the United States be declared to customs officers. This is not the place to

analyze in detail the purport and structure of Title 19, and the numerous regulations passed under authority granted thereby. But it is submitted that even a cursory examination thereof discloses them to be a body of customs-import statutes dealing with *imported* goods, the proper and legal method of their entry into this country, and the penalties for failure to observe same. As stated by the older decisions, custom laws are "for the collection and protection of the fisc".

Specifically, the courts below seem to misconceive the concept of 'entry and declaration', (See II(c) hereinafter). As shown by customs form 6063 (Exhibit A, R. p. 35), the primary act is *entry,*—a disclosure of the list of foreign acquired goods offered for import; and the declaration is only a verification of the entry. Yet the courts below have interpreted section 1497 as a disclosure statute requiring all goods brought into the United States, whether voluntarily or otherwise, and whether or not intended for import here, to be declared to customs officers. In fact section 1497 is a penal statute imposing forfeiture and penalties for failure to enter and declare *imported* goods. It is not a statute which *creates an obligation* to declare and enter, but which penalizes a failure to comply with an obligation to enter and declare *created elsewhere.* The only such obligation found by the courts below was a failure to declare (not to enter and declare) under the first sentence of regulation 10.19 which was passed under authority of section 1498 (a) (6).

So far as past authority is concerned, the issue in the present case narrows down to the following. Petitioner concedes that non-declaration of *imported* goods may result in forfeiture, even if without any "intent to defraud".

United States v. *One Pearl Necklace,* 111 Fed. 164 (1901) 2d Circuit

Dodge v. *United States,* 131 Fed. 849 (1904) Second Circuit

United States v. *Harts,* 131 Fed. 886 (1904) Dist.Ct., N.D. Cal.

United States v. *20 Strings Seed Pearls, etc.,* 34 F.2d 142

United States v. *Kushner,* 135 F.2d 668, 672: Second Circuit

This is so even when the owner thinks there is no obligation to declare dutiable articles,

United States v. *One Pearl Necklace,* 111 F. 164 (1901)

And it is so even if the goods in fact are duty free, for the reason that it is not the function of the importer to determine what is dutiable and what is not, but he must give the Government the information as to what he is importing so that it can make its own determination. *United States* v. *25 Pictures,* 260 F. 851 (1919), Dist. Ct. S.D.N.Y.

But in all the above cases "an intent to import" was present. In the present case it is concededly lacking. The present case appears to be the first attempt to apply the statutes here in question, or any customs statutes, to non-imported goods in the possession of a non-arriving person, where both were brought here involuntarily and attempted to leave at once for their proper destination outside the United States, and where the customs form executed was neither an entry or a declaration, but a notice that he was a passenger destined for Canada, who was overflown, and In Transit to his proper destination.

The question is a novel one, which should be decided by this Court. It is of increasing importance at the present time, not only to the administration of custom laws, but more particularly with respect to international air traffic.

The expansion of that traffic, and the general establishment of "in transit" quarters where passengers may change from one international plane to another, or may move about during a stop so long as they keep within the physical limits of such "in transit" quarters, in either event theoretically free of customs laws in the country where such stop is made, make it of increasing importance that this Court determine whether such "in transit" quarters are real or illusory.

Other reasons applying to specific statutes and regulations follow; but the foregoing underlies them all.

II. (a) Regulation 10.19 (19 C.F.R. 10.19) is void, when applied to a non-arriving person, as being in excess of the statutory authority conferred on the Secretary of the Treasury.

The right of Customs to examine baggage under 19 U.S.C. 1496 (p. 4, *supra*) is limited to an examination of the baggage "of any person *arriving* in the United States". The "declaration and entry" referred to in 19 U.S.C. 1497 (p. 4, *supra*) is a declaration and entry in writing "by such person"; and the forfeiture and penalties provided in Section 1497 are upon "such person", and his property not entered and declared. The power of the Secretary of the Treasury to prescribe rules and regulations for "declaration and entry" under section 1498 (p. 4, *supra*) is limited by subsection (6) to "Articles carried on the person or contained in the baggage of a *person arriving* in the United States".

Yet the basis found by the court below for obliging the petitioner to file a Customs declaration, and the peg on which it hung the penalty of forfeiture invoked by section 1497, was the first sentence of regulation 10.19 (19 C.F.R. 10.19) as follows:

"All articles brought into the United States *by any individual* shall be declared to a Customs officer."

As will hereinafter be shown, the concept of an obligation to declare without a primary obligation to make entry is contrary to customs concepts and practices; and the first sentence of Regulation 10.19 should not be read out of its context. But more important on this phase of the argument is the fact that the authority of the Secretary to pass the regulation was limited by section 1498 (a) (6) to "Articles carried on the person or contained in the baggage of a *person arriving* in the United States".

As applied to a non-arriving person, such as the petitioner, who was brought here involuntarily, and attempted to leave at once to his proper destination in Canada, this regulation is void, as being in excess of the Secretary's authority. For a parallel holding, see the case of the bond exacted under Section 1442 in *United States* v. *Sullivan*, 26 F.2d 606 (1928) Fifth Circuit.

II. (b). As to Section (b) of the Second Question Presented, concerning the meaning of 'Arriving' in 19 U.S.C. 1496-1498, the Writ should be granted because the interpretation of 'arriving' used by the court below is in conflict with numerous decisions of this Court and of various other federal courts.

"Arriving" and "arrival" have different meanings in Customs decisions and statutes, depending on whether contraband or legally importable goods are under consideration. Contraband "arrives" in the United States when it voluntarily enters United States territory, including territorial waters, regardless of any intent to unlade same.

Cunard Steamship Company, et al. v. *United States*, 262 U.S. 100

U. S. v. *Cammanata,* 194 Fed. 903
Palmero v. *United States,* 112 F.2d 922 (1940) First Circuit

But legally importable merchandise does not arrive in the United States until it voluntarily arrives at some port of the United States "with intent to unlade there".

United States v. *Vowell,* 5 Cranch (9 U.S.) 368
The Mary, 16 Fed. Cases 932 (1812), First Circuit, Case #9183
The Apollon, 9 Wheaton 362
Harrison v. *Vose,* 9 Howard 372
The Cargo ex Lady Essex, 38 Fed. 756
The Javarina, 67 Fed. 152 (1895), Fifth Circuit
Keck v. *United States,* 172 U.S. 434
The Przemysl, 23 F.2d 336, 342

This classic interpretation of "arrival" in the decisions is supported by the provisions of 19 U.S.C. 1442 (App. A, p. 38). U. S. Customs law does not provide for the entry and declaration of, or the payment of duties on, all goods which may happen to touch at a United States port, wherever destined, but only of those goods acquired abroad which are to be "imported" into the United States. As was stated in *The Przemysl,* 23 F.2d 336, 342.

> "For the purpose of these Customs revenue laws, the term 'importation' must be taken as one to which the Government's right to duty attaches at the earliest upon an arrival within the limits of a port of entry; the importation being complete only when the taxable, dutiable commodity is brought there, with the intention of unlading them there for fusion with the commerce of the country".

The concepts of "arrival" and "importation" are correlative in the sense that an article is not "imported" unless there is a voluntary "arrival" with "intent to unlade". And the words "bring into the United States" meaning nothing more than "import".

Tomplain v. *United States*, 42 F.2d 203, 204
Kidd v. *Flagler*, 54 Fed. 367, 369

It is respectfully submitted that the meaning of the words "arrival" and "importation" above set forth are the classic meanings of said words in Customs law; and that the opinion below has interpreted said words in conflict with the decisions of this Court and of the other Federal courts above cited, when it alleged that the petitioner's brief in the court below was interpreting those words "in a limited technical sense".

II. (c). As to Section (c) of the Second Question Presented, concerning the proper customs concept of Entry and Declaration, the Writ should be granted because the decision below is in conflict with the clear and plain meaning of that concept in customs statutes.

With the exceptions expressly set forth in Section 1484, the United States customs concept of entry and declaration of goods imported into the United States is controlled by the provisions of 19 U.S.C. 1484 and 1485 (App. A, pp. 39, 40).

Under Section 1484 (a) the obligation to make entry of imported merchandise is placed upon "the consignee of imported merchandise". Section 1485 (a) provides that "Every consignee making an entry under the provisions of Section 1484 . . . shall make and file therewith . . . a declaration under oath".

Hence, an *entry* appears to be a presentation of goods for importation, made out in writing on a customs form

and presented at the custom house, and backed by a certified invoice and such other papers or information as may be required. The *declaration* appears to be a verification under oath of the completeness, accuracy, and value of the items listed in the entry. But no *entry* is required except of articles offered for *import*; and no declaration is required except from one *required to make an entry.*

None of the other sections excepted by Section 1484 vary the fundamental concept of 'entry and declaration of imported merchandise' under sections 1484 and 1485.

Section 1498 does not achieve a contrary result. The authority there granted the Secretary of the Treasury was an authority "to prescribe rules and regulations for the declaration and entry of . . . ". Regulation 10.19 was passed under this authority, 19 CFR 10.19; and in fact requires both entry and declaration (where it requires either), and not a declaration alone. The first sentence of paragraph (a) cannot be read in isolation; but must be read in conjunction with paragraph (c) (1), (App. A, p. 42), which provides:

> "Unless an oral declaration is accepted under paragraph (b) of this section, the declaration required by paragraph (a) of this section shall be in writing and in a form approved by the Commissioner of Customs."

Paragraph (b) is not applicable by its terms; and the United States admitted (Admission 16, R. pp. 26, 44, 45) that the form given petitioner to sign (Exhibit A., R. p. 35, customs form 6063) was the only form provided by the Government for that purpose. That *form* is clearly a form of combined entry and declaration, (although it was quite the contrary in the altered condition in which it was executed by the petitioner, *C. C. Mengel & Bros.* v. *Handy Chocolate Co.*, 10 F.2d 293, (1st Circ.)).

Yet the opinion of the Court below states (R. p. 78; App. B, p. 46):

> "The structure of the customs laws and regulations reflects a distinction in the requirements applicable to merchandise brought into the country as ship's cargo, on the one hand, and items carried on the person or in baggage on the other."

It is respectfully suggested that this statement, if at all valid, is so only accidentally and in detail. It is true that the procedure of going through Customs is different in *detail.* Passengers and their belongings are not entered "at the customhouse within 48 hours, exclusive of Sunday and holidays, after the entry of the importing vessel or report of the vehicle, . . . ", but are processed on the pier or the airport where they land. But the fundamental *structure* is the same in each case, viz., that only articles to be *imported* must be entered; that such *imports* must be entered, in the one case by the consignee, and in the other by the passenger-owner; and that only in the event that a person is required to make *entry,* is he secondarily liable to *declare. United States* v. *Harts,* 131 Fed. 886.

It may be conceded that voluntary entry of foreign goods into this country, even if intended to be here only temporarily or to pass through in transit to a foreign country, cannot be allowed without safeguard or restriction lest they be diverted into U. S. commerce without the payment of duties. For such voluntary introductions the devices of "free ports" and "bonded warehouses" were created, and statutes passed, such as 19 U.S.C. 1553 permitting transportation in bond through the U. S. to a foreign country, either of merchandise or of baggage and personal effects, "without appraisement or the payment of duties."

This is not such a case; and such provisions were both inapplicable and unnecessary.

Petitioner and his baggage were at all times in Government quarters and under customs surveillance from the time he was involuntarily landed at the Boston airport at 4:30 a.m. until the planes to Canada on which he had been furnished transportation by the over-flying line departed at 7:00 a.m. to Montreal and 9:00 a.m. to Halifax the same morning. (Admissions 18, 19, 23, 29, 31, 32, 33: R. pp. 27, 28, 29, 30, 45, 46, 47).

As was said in *U. S.* v. *Sullivan*, 26 F.2d 606 (5th Cir.) (1928) concerning the government's insistence upon a bond to cover the value of a cargo of liquor towed into port in distress (page 608):

> "But expediency does not create legality. The Government can be amply protected by guarding the cargo, as was done in this case."

Question No. III

The principal reason for granting the writ on the question whether the libel sets forth a cause of action, is the same reason underlying all sections of Question Number II, viz. the entirely novel concept of the courts below that a customs-import statute can be invoked to forfeit goods not intended or attempted to be imported.

But any libel must at least allege a cause of action; and to justify a forfeiture under Section 1497, this libel must allege and show a violation of that section.

The libel in this case demands a forfeiture on the basis of, customs-import statutes and regulations. It should, therefore, at least allege facts making out a customs-import case, viz., "an arriving" person who intended to enter the United States, an intention to import foreign acquired goods, and an obligation to make entry and declaration which was not fulfilled. Its failure so to do was raised

both by petitioner's Motion for Summary Judgment (R. p. 18) and by his Claim and Answer (R. p. 8.)

Except for a recitation that the diamonds were seized in petitioner's possession, all material allegations of the libel are set forth in those paragraphs thereof (R. p. 7) reading as follows:

> "That on or about June 7, 1954, the said diamonds were not included in the declaration as made by Samuel Leiser when he arrived in the United States at Boston, Massachusetts, from a foreign country, and were not declared either orally or in writing before the examination of his baggage was begun, as required by the provisions of Title 19 U.S.C. 1497, 1498 as amended, and 1624, and regulations prescribed thereunder."
> "That by reason thereof and by virtue of 19 U.S.C. 1497, these said diamonds are subject to forfeiture to the United States."

Whether or not said paragraphs parenthetically infer that petitioner was a "person arriving", or that he had an obligation to "declare", they carefully avoid a direct allegation to that effect. No obligation to make "entry" is either alleged or inferred, although the forfeiture invoked "by virtue of 19 U.S.C. 1497" is not for failure to *declare* only, but for failure to *enter and declare.* The libel did not even allege that the diamonds were acquired abroad, although that fact petitioner admitted in his claim and answer. The libel neither alleged nor inferred that petitioner tried to "import" or introduce the diamonds into the United States or its commerce.

Chronologically the libel was filed within a month after the "not guilty" verdicts in *U. S.* v. *Leiser,* which negatived the facts of "arrival", and "intent to import", with a resulting absence of any obligation to enter or declare (see

excerpts from charge therein (R. pp. 38, 39)). Even if the facts there decided are not res judicata, under the doctrine of *Helvering* v. *Mitchel,* 303 U.S. 391, if they are facts necessary to state a case the libel must at least allege them. It did not.

Despite this, and despite the specific facts found by him in the record (R. p. 69), the Judge in the District Court upheld "the governments view that the admitted fact that these diamonds were not declared is sufficient for it to prevail." Similarly the Court of Appeals held (R. p. 79; App. B, p. 47), "that section 1497 subjected to forfeiture the diamonds which appellant failed to declare regardless of the fact that he came into this country involuntarily and with 'no intent to unlade'."

Hence the naked holding of the courts below is that the physical presence of the diamonds in Boston required their declaration, or a resulting forfeiture, regardless of the admitted facts:

> (1) That petitioner and his diamonds arrived in the United States involuntarily because of weather conditions or vis major;
>
> (2) That when petitioner learned Gander was overflown he "insisted on returning to Canada by the first available transportation";
>
> (3) That no attempt was made to import the diamonds into the United States; and
>
> (4) That no obligation to make entry of the diamonds is even alleged by the government or the courts below.

This does not set forth a cause of action.

There is one further reason. Assuming that the courts below are correct, and that regulation 10.19 created an obligation for petitioner to 'declare' but not to make entry, no allegation or showing is made as to how a forfeiture for

failure *to enter and declare* under § 1497 can result from a mere failure *to declare* under regulation 10.19.

QUESTION No. IV

Several arguments were advanced by the petitioner in the Court of Appeals on the question of Double Jeopardy. However, that Court treated only the argument that the issues raised by the libel were the same as those in issue under Count 2 of the criminal indictment. On that subject the Court said (R. p. 79; App. B, p. 47):

> "It seems to us clear that the issues are not the same. The indictment charged that appellant did *fraudulently* and *knowingly* violate 19 U.S.C. 1497. The instant case does not concern itself with what intent § 1497 was violated. If it has been violated in good faith, the diamonds are nonetheless subject to forfeiture." *United States* v. *20 Strings Seed Pearls, etc.*, 34 F.2d 142.

It is respectfully submitted that the above analysis is not correct; that it is in conflict with decisions of this Court and of courts in other circuits; and that certiorari should be granted at least for the reason that petitioner be allowed to show that the issues *are* the same.

In the first place, Count 2 of the indictment did not charge that the petitioner *fraudulently* and *knowingly* violated 19 U.S.C. 1497, but rather that he fraudulently and knowingly imported in violation of 18 U.S.C. 545. No allegation is made in said Count 2 that the merchandise was *fraudulently* and *knowingly* not included in the declaration and entry as made. If it did, it would make no difference, because the allegations "fraudulently" and "knowingly" are satisfied by a mere showing that information was with-

held from customs officials; i.e. that the goods were not entered and declared.

Second, what is meant by a violation of § 1497 "in good faith" is not clear. Conceding that a failure to enter and declare *imported* goods may require forfeiture, even if without any "intention to defraud the United States," and even if, in fact no duty is due,

> *U. S.* v. *25 Pictures,* 260 Fed. 851, 854 (1919) (D.C.S.D. N.Y.)
>
> *U. S.* v. *Kushner,* 135 F.2d 668, 671, 672 (2nd Cir.)

and other cases cited under Question II above (pp. 17, 18, *supra*), yet in *U. S.* v. *2 Baskets,* 205 Fed. 37 (1913) (2nd Cir.) a 'bona fide' violation was held to entitle claimant to recover the seized articles. Here claimant knew of the 2 baskets and had baggage tickets for same; but did not enter them, because he thought they were following him to the U. S. on another ship.

But the 'intent' referred to in all such cases, including *U. S.* v. *20 Strings Seed Pearls,* 34 F.2d 142, cited by the Court of Appeals, was an 'intent to defraud' or at least an 'intent to withhold information.' The intent of the passenger to enter the U. S. and his intent to *import* the articles in question were admittedly present and not in issue. It is just these intents to *enter* and to *import* which are concededly absent in the present case; and it is respectfully submitted that the courts below have confused the presence of an 'intent to defraud' in the decided cases, with the absence of an 'intent to import' in the present case.

The 'intent to import' is so implicit in § 1497 and so fundamental to the concepts of customs law, that it has never been challenged by the government or considered in any of the decided cases. Now that it has been raised here, the writ should be granted so that this Court can decide it.

Count 2 of the criminal indictment seems to follow a form peculiar to indictments in other customs cases. It first makes a general charge that defendant acted, or failed to act, "contrary to law" in violation of one section of the customs statutes; and then makes a specific charge "in that the defendant" acted, or failed to act, in violation of another section of the statute. It is the second and specific allegation that is the gravamen of the indictment, and sets forth the specific act or failure to act which the Government must prove

U. S. v. *50 Waltham Watch Movements,* 139 Fed. 291 (D.C.,N.D.,N.Y.) (1905)
U. S. v. *Kushner,* 135 F.2d 668 (1943) (2nd Cir.)

That procedure and the meaning of 'contrary to law' as there used, are explained in *Goldman* v. *U. S.,* 263 Fed. 340 (1920) at Page 343.

Substantially the same procedure was recently sanctioned by this Court in *U. S.* v. *Dixon,* 347 U.S. 381.

In the present case the charges in Count 2 break down into two parts as follows:

1. That the defendant (petitioner) fraudulently and knowingly imported diamonds into the United States contrary to law, in violation of 18 U.S.C. 545, in that
2. Said diamonds were not included in the declaration and entry as made as required by 19 U.S.C. 1497 and 1498 and regulations prescribed thereunder.

So in the present case the gravamen of that count, and the specific offense which the Government charged and had to prove, was that petitioner, intending to import his diamonds, failed to declare same in violation of Section 1497.

The reliance by the Court of Appeals on the words

fraudulently and knowingly, as making the issues in Count 2 different from those in the libel, has been considered above.

But it may be contended that the general allegation of Count 2 charges an attempt to *import*, while the libel does not. This again raises the underlying issue as to whether a customs-import statute can be applied to non-imported goods, and cause a forfeiture thereof.

If importing is implicit in Section 1497, then the issues in the libel and in Count 2 are identical. If it is *not*, that statute has no meaning. It was not passed to punish non-entry and non-declarations of goods not intended or attempted to be brought into the U. S.

A reading of the consecutive sections of the statutes pertaining to passengers and their baggage arriving from abroad, 19 U.S.C. 1496, 1497, 1498 (a) (6), and of the regulations passed by the Secretary of the Treasury thereunder, will show that implicit in, and underlying the whole pattern and tenor thereof, is the concept that the passengers and their baggage are intended for import into the United States (i.e. the passengers are destined for the United States and their baggage to be unladed and introduced into the United States). They should not be tortured out of that concept.

The Government is entitled to prevail either under the second section of 18 U.S.C. 545, or under 19 U.S.C. 1497, on proof that a person was attempting to import foreign articles into the United States and that he intentionally did not declare them. That identity of proof is the test on the issue of double jeopardy. See *Morgan* v. *Devine*, 237 U.S. 632, 641:

> "As to the contention of double jeopardy upon which the petition of habeas corpus is rested in this case, this court has settled that the test of identity of

> offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes."

The proof necessary to sustain the libel in these proceedings is the same proof that was necessary to support the second count of the indictment in *United States* v. *Leiser*, viz.,

> An intention to import
> A failure to declare

That was the position taken by the presiding judge in the trial of *United States* v. *Leiser* in January of 1955, (R. pp. 38, 39).

If the issues are the same, the writ should also be granted for a reason which the Court of Appeals did not consider, viz. that the forfeiture sought is punitive in nature, and not a "civil sanction."

The cases of civil sanctions were all different on their facts, in that the Government there had civil rights at stake, entirely independent of the question whether a crime had been committed. In *Stone* v. *U. S.*, 167 U.S. 178, 186 government property (timber) had been converted; in *Helvering* v. *Mitchell*, 303 U.S. 391, Mitchell owed taxes; and in *U. S. ex rel Marcus* v. *Hess*, 317 U.S. 537 and *Murray & Sorenson, Inc.* v. *U. S.*, 207 F.2d 119 (1st Circ.), the defendants had defrauded the government under contracts.

But the present case, like *Coffey* v. *U. S.*, 116 U.S. 436, is one where the United States has no claim of any kind "except as the result of forfeiture."

> *Stone* v. *U. S.*, 167 U.S. 178, 186, 188.

Even under the 'civil sanctions' doctrine of *Helvering* v.

Mitchell, 303 U.S. 391, 397, "Where the objective of the subsequent action likewise is punishment, the acquittal is a bar—" because of double jeopardy.

See also the observations of Mr. Justice Frankfurter in *U. S. ex rel Marcus* v. *Hess,* 317 U.S. 537, 553, 554 on the distinction between "sanctions that are remedial and those that are punitive."

To sustain the libel in this case would be to punish the petitioner by forfeiting the diamonds which he did *not* smuggle, or even attempt to import, into the United States.

The *Coffey* case was not over-ruled by *Helvering* v. *Mitchell*

United States v. *National Assoc. of Real Estate Boards,* 339 U.S. 485, 493 (note 6) (1950)
United States v. *One DeSoto Sedan,* 85 Fed. Supp. 245; 180 F.2d 583 (4th Circ.) (1950)
United States v. *38 cases,* 99 Fed. Supp. 460, 463, 464

That forfeitures and penalties of this nature are truly punitive, see

United States v. *Dixon,* 347 U.S. 381, 383, 385, 387
Cotonificio Bustese v. *Morgenthau,* 121 F.2d 884 (CCA of D.C.) at page 888.
United States v. *38 cases,* 99 F. Supp. 460, 464.

It is not merely coincidental that the penalty of forfeiture is mandatory both under 18 U.S.C. 545 and 19 U.S.C. 1497. That penalty is clearly punitive when invoked under 18 U.S.C. 545 (App. A, pp. 37, 38):

"Merchandise introduced into the United States in violation of this section shall be forfeited to the United States."

and can not be otherwise when invoked under 19 U.S.C. 1497 (p. 4, *supra*):

> "Any article not included in the declaration and entry as made, and, before examination . . . was begun, not mentioned in writing . . . , shall be subject to forfeiture."

It is the *same* penalty in either case.

QUESTION No. V.

A deprivation of constitutional rights and privileges justifies the granting of the writ, without reciting any other or special reasons.

Petitioner's claim of his constitutional privileges,—against unreasonable search and seizure, and violation of due process—, was duly made in his Claim and Answer and in particular in Paragraph VII and Paragraph IX C, D, et seq. (R. pp. 12, 15, 16).

It is the petitioner's contention that, on the admitted facts recited in the Statement of the Case, and in particular on the facts disclosed from Exhibit A (R. 35) and the facts found by the District Court (R. p. 69), there was no obligation for petitioner to make entry or declaration (Aldrich, J. R. pp. 38, 39). Much less, therefore, was there any occasion for customs agents to make a search and seizure. But they did so, although petitioner was not an "arriving person," 19 U.S.C. 1496, and although they knew of the involuntary entry and the cause thereof (Exh. A, R. p. 35; and Adm. 9, R. pp. 24, 43). That is the seizure on which this libel is based.

While *Boyd* v. *U. S.*, 116 U.S. 616, 623, holds that the search and seizure clause does not apply to smuggling cases, the present is not a smuggling case. In fact, the

decision below can only be upheld on the basis that no importation or attempted importation is involved, as otherwise the libel sets forth the same charge as Count 2 of the indictment, and is double jeopardy.

Whether or not an individual has been subjected to illegal search and seizure, or deprived of due process, depends on the facts of each case. As the result of the allowance of the motion for Summary Judgment, petitioner was deprived of an opportunity to more fully develop the facts as to just what happened after he was approached by customs officers at the airport. What meager evidence there is, results from petitioner's efforts to develop the facts by means of interrogatories, and of requests for admissions of fact; and the District Court in part upheld objections of the government to these, (R. pp. 51, 54). Petitioner appealed from such action (R. p. 73).

Conclusion

For all of the foregoing reasons petitioner submits that the writ should be granted.

Apart from specific arguments as to involuntary entry, interpretation of statutes, and double jeopardy, petitioner contends that the decisions in the District Court and Court of Appeals below have declared an entirely new and startling concept of customs law by which a customs-import statute is used to forfeit goods which there was no obligation to enter or declare, and no intent or attempt to import. If that is a valid concept, at least it is a new one; and should be decided by this court.

But all in all it is too clear for argument that that was not the concept under which the United States caused petitioner to be indicted. Count 1 of the indictment was for smuggling, and Count 2 for importation "contrary to law" in that the goods were not declared under "19 U.S.C.

1497 and 1498 and regulations prescribed thereunder." The entire incident of June 7, 1954, was treated by the Government as a case of illegal importation until petitioner was acquitted in January, 1955. In February, 1955, the same incident became the basis of this present libel, for the same non-declaration under "19 U. S.C. 1497 and 1498" etc., with all mention of importation, legal or otherwise, excised.

That is how the new concept started. The courts below held that non-declaration constituted a violation of Sec. 1497; but failed to cite any authority, or advance any explanation, as to how Sec. 1497 could be violated unless there was an *intent* or an *attempt* to import involved.

Unless the idea of "importing" is implicit in Sec. 1497, there is no reason for that statute; and the libel states no cause of action. If importing is implicit in Sec. 1497, then the libel still states no cause of action unless it does allege an *intent* or *attempt* to import. Only if the libel charges both an "intent to import," plus a non-entry and non-declaration (allegations which are missing, and in any event refuted by the admitted facts), can it state a cause of action for violation of Sec. 1497. And if it does that, it states the same charge as Count 2 of United States v. Leiser; and spells out the "double jeopardy" argued under Question No. IV above. In fact Count 2 by its terms defined a violation of Sec. 1497 as an importation "contrary to law."

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

Constitution of the United States

Amendment IV. *Searches and Seizures.*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. *Capital Crimes; Due Process.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

18 U. S. Code, Sec. 545.
Smuggling goods into the United States.

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have

been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this Section shall be forfeited to the United States.

19 U. S. Code, Sec. 1442.
Residue Cargo.

Any vessel having on board merchandise shown by the manifest to be destined to a foreign port or place may, after the report and entry of such vessel under the provisions of this chapter, proceed to such foreign port of destination with the cargo so destined therefor, without unlading the same and without the payment of duty thereon. Any vessel arriving from a foreign port or place having on board merchandise shown by the manifest to be destined to a port or ports in the United States other than the port of entry at which such vessel first arrived and made entry may proceed with such merchandise from port to port or from district to district for the unlading thereof.

19 U. S. Code, Sec. 1484.
Entry of merchandise—Requirement and time.

(a) Except as provided in sections 1490, 1498, 1552, and 1553 and in subdivision (j) of section 1336 of this chapter, and in subdivisions (h) and (i) of this section, the consignee of imported meschandise shall make entry therefor either in person or by an agent authorized by him in writing under such regulations as the Secretary of the Treasury may prescribe. Such entry shall be made at the customhouse within forty-eight hours, exclusive of Sundays and holidays, after the entry of the importing vessel or report of the vehicle, or after the arrival at the port of destination in the case of merchandise transported in bond, unless the collector authorizes in writing a longer time.

19 U. S. Code, Sec. 1485.
Declaration—Requirement; forms and contents.

(a) Every consignee making an entry under the provisions of section 1484 of this title shall make and file therewith, in a form to be prescribed by the Secretary of the Treasury a declaration under oath, stating—

(1) Whether the merchandise is imported in pursuance of a purchase or an agreement to purchase, or whether it is imported otherwise than in pursuance of a purchase or agreement to purchase;

(2) That the prices set forth in the invoice are true, in the case of merchandise purchased or agreed to be purchased; or in the case of merchandise secured otherwise than by purchase or agreement to purchase, that the statements in such invoice as to value or price are true to the best of his knowledge and belief;

(3) That all other statements in the invoice or other

documents filed with the entry, or in the entry itself, are true and correct; and

(4) That he will produce at once to the collector any invoice, paper, letter, document, or information received showing that any such prices or statements are not true or correct.

19 U. S. Code, Sec. 1615.
Burden of proof in forfeiture proceedings.

In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: *Provided,* That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof.

19 U. S. Code, Sec. 1624.
General Regulations.

In addition to the specific powers conferred by this title, the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of this title.

FEDERAL REGULATIONS.

19 C.F.R. 10.19.
Declaration and entry.

(a) ***Declaration required.*** All articles brought into the United States by any individual shall be declared to a customs officer. The declaration may be made to a customs officer at the port of first arrival in the United States or on a train or ferry en route to the United States on which such an officer is assigned for that purpose. When all the articles to be declared are within allowable exemptions, the declaration may be submitted to a United States customs officer stationed in a foreign country for that purpose, if one is available.

(b) ***Oral declarations.*** Each arriving nonresident may make only an oral declaration if all the articles he has to declare are entitled to free entry under paragraph 1798 (b) (1) or (3), Tariff Act of 1930, as amended, and each returning resident may make only an oral declaration if (1) he has no article in his possession on which duty or internal-revenue tax is collectible, (2) all articles for which any exemption is to be claimed in connection with his arrival accompany him at the time of his arrival, and (3) the aggregate of the value of all articles acquired abroad by him and of the cost or value of alterations and dutiable repairs made abroad to personal or household effects taken out and brought back by him (see Sec. 10.17 (a)) does not exceed $100; except that written declarations may be required generally or in respect of particular types of traffic if necessary at any seaport or airport to effect prompt and orderly clearance of passengers and their effects, and may be required in particular cases at any port if deemed necessary to protect the revenue.

(c) *Written declarations.* (1) Unless an oral declaration is accepted under paragraph (b) of this section, the declaration required by paragraph (a) of this section shall be in writing and in a form approved by the Commissioner of Customs. Effects of a nonresident entitled to free entry under paragraph 1798 (b), as amended, and effects of a returning resident entitled to free entry under paragraph 1798 (a) or (c) (1) (other than automobiles and other vehicles of residents returning from non-continguous countries) need not be itemized in written declarations.

(2) Written declarations for passengers arriving by sea shall be executed fully and deposited with the purser of the vessel not later than the day before the vessel will arrive in port.

(d) *Acknowledgment.* Each written declaration shall be acknowledged by the declarant before the customs officer who examines the baggage covered by the declaration.

Appendix B

United States Court of Appeals
For the First Circuit

No. 5098.

SAMUEL LEISER,
CLAIMANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
LIBELANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge,* and WOODBURY and HARTIGAN, *Circuit Judges.*

Paul E. Troy, with whom *Arthur Brogna* was on brief, for appellant.
George H. Lewald, Assistant U. S. Attorney, with whom *Anthony Julian*, United States Attorney, and *Andrew A. Caffrey*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT.
June 13, 1956.

HARTIGAN, *Circuit Judge.* This is an appeal from a decree entered January 31, 1956, in the United States District Court for the District of Massachusetts allowing appellee's motion for summary judgment in a libel proceeding instituted by the appellee against 532.33 carats, more or less, of cut and polished diamonds.

The appellant, Samuel Leiser, with the diamonds in his possession, was traveling by air from Frankfort, Germany to Gander, Newfoundland by way of Paris. His ultimate

destination was Bermuda. His tickets called for no stop in the United States, but owing to adverse weather conditions his plane overflew Gander at about 11:30 p.m. on June 6, 1954, and appellant, contrary to his original expectation and intent, landed at Boston, Massachusetts on the morning of June 7, 1954. Before any customs officer approached him in Boston he made arrangements to return to Canada by the next available plane which was scheduled to leave at 7 a.m. Appellant failed to declare the diamonds in his possession. Subsequent discovery by the customs officers led ultimately to a criminal indictment alleging, in Count 1, that appellant "* * * did knowingly and willfully * * * smuggle and clandestinely introduce into the United States certain merchandise * * *," and, in Count 2, that appellant "* * * did fraudulently and knowingly * * * bring into the United States certain merchandise * * * contrary to law, in that said merchandise was not included in the declaration and entry as made, and was not declared either orally or in writing before examination of his baggage was begun as required by the provisions of 19 U.S.C. 1497 and 1498 * * * in violation of 18 U.S.C. 545." In January 1955, appellant was tried and acquitted on both counts. Shortly thereafter appellee instituted the present libel proceedings against the diamonds in question.

Without pausing to consider appellant's first contention that the libel does not set forth a cause of action entitling the United States to forfeiture, which is without merit, we turn directly to his second and somewhat more substantial claim that goods involuntarily brought into the United States by wreck, distress of weather, or vis major are exempt from customs and other local laws of the United States.

Title 19 U.S.C. § 1498 provides that:

"(a) The Secretary of the Treasury is authorized

to prescribe rules and regulations for the declaration and entry of—

* * *

"(6) Articles carried on the person or contained in the baggage of a person arriving in the United States;

* * *."

Title 19 U.S.C. § 1624 provides that:

"In addition to the specific powers conferred by this title, the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of this title."

Pursuant to the authority conferred in the aforementioned sections, the Secretary prescribed by regulation, set forth in 19 C.F.R. § 10.19: "*Declaration and entry*—(a) *Declaration required.* All articles brought into the United States by any individual shall be declared to a customs officer. * * *"

Congress has further provided in Title 19 U.S.C. § 1496:

"*Examination of baggage*

"The collector may cause an examination to be made of the baggage of any person arriving in the United States in order to ascertain what articles are contained therein and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry therefor has been made."

"§ 1497. *Same; penalties*

"Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required,

> or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article."

As we understand appellant's argument, he contends that the word "arriving" as it appears in §§ 1496 and 1498 is to be construed in a limited technical sense, under the authority of various cases involving ships which he has cited, as meaning not mere physical arrival but rather "a voluntary or intentional arrival of such goods 'with intent to unlade' same * * *" in the United States. We cannot agree with this contention.

The structure of the customs laws and regulations reflects a distinction in the requirements applicable to merchandise brought into the country as ship's cargo, on the one hand, and items carried on the person or in baggage on the other. We are not convinced that any and all exemptions which may be accorded to ships in distress must of necessity be likewise granted to individuals arriving involuntarily by air. Moreover if it had been the intent of Congress to extend similar exemptions to such individuals, we believe it would not have been done inferentially by relying upon some highly technical interpretation of an ordinary word such as "arriving", but, on the contrary, would have been spelled out in some detail as was done in § 1441(4) relating in part to vessels arriving in distress. An examination of this section reveals that it is not every vessel arriving involuntarily which is exempt from an obligation to make entry at the customhouse, but only those "* * * which shall depart within twenty-four hours after arrival without having landed or taken on board any passengers or any merchandise other than bunker coal, bunker oil, sea stores, or ship's stores * * *." We can think of no reason why Congress would wish to grant a much more

generous blanket exemption in the case of persons arriving involuntarily by air. On the contrary, the necessity of qualifying and circumscribing any such exemption would appear to be equally imperative.

We believe the word "arriving" as it appears in relevant sections of the statute does not bear the construction for which appellant contends. We believe that § 1497 subjected to forfeiture the diamonds which appellant failed to declare regardless of the fact that he came into this country involuntarily and with no "intent to unlade."

We make no mention of appellant's contentions with respect to res adjudicata and double jeopardy except to note briefly that each is based upon the same underlying error. At page 50 of his brief appellant says:

> "It has been pointed out under point V above that the issue in both the criminal case and the present proceedings is the same, viz., whether or not the appellant violated 19 U.S.C.A. 1497 by failing to declare the diamonds which were on his person when he was involuntarily flown into the United States. In both cases he was charged with violating that section."

It seems to us clear that the issues are not the same. The indictment charged that appellant did *fraudulently* and *knowingly* violate 19 U.S.C. 1497. The instant case does not concern itself with what intent § 1497 was violated. If it has been violated in good faith the diamonds are nonetheless subject to forfeiture. *United States* v. *20 Strings Seed Pearls, etc.*, 34 F.2d 142.

The judgment of the district court is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 391

SAMUEL LEISER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 75–79; Pet. 43–47) is reported at 234 F. 2d 648. The opinion of the District Court (R. 68–70) is reported at 137 F. Supp. 527.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1956 (R. 80). The petition for a writ of certiorari was filed on September 6, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the unplanned landing in the United States of a plane scheduled to land in Newfound-

land exempted a passenger from the application of the United States customs law requiring passengers to declare the contents of their baggage.

2. Whether a libel for forfeiture of undeclared diamonds subjected the petitioner to double jeopardy where he had previously been acquitted under an indictment charging knowing and fraudulent smuggling of the diamonds into the country.

3. Whether the government acquired possession of the diamonds by unlawful search and seizure.

STATUTES AND REGULATIONS INVOLVED

The Act of June 17, 1930, c. 497, Sections 496, 497, 498, 624, 46 Stat. 727, 728, 759 (19 U. S. C. 1496, 1497, 1498, 1624) provides:

> SECTION 496. The collector may cause an examination to be made of the baggage of any person arriving in the United States in order to ascertain what articles are contained therein and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry therefor has been made.
>
> SECTION 497. Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.
>
> SECTION 498. The Secretary of the Treasury is authorized to prescribe rules and regulations for the declaration and entry of—
>
> * * * * *

(6) Articles carried on the person or contained in the baggage of a person arriving in the United States;

* * * * *

SECTION 624. In addition to the specific powers conferred by this Act, the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * *

19 C. F. R., 1956 Supp., 6.3 (g) provides in pertinent part:

* * * * *

Should any aircraft coming into the United States from any place outside thereof, or into any area from any other area, make an emergency or forced landing in the United States, the aircraft commander shall not allow any merchandise, including baggage, to be removed from the landing place without permission of the customs officer, nor allow any passengers or persons employed thereon to depart from the landing place without permission of the customs officer, unless such removal or departure is necessary for purposes of safety, communications with customs authorities, or the preservation of life, health or property. As soon as practicable, the aircraft commander, or a member of the crew in charge, or the owner of the aircraft, shall communicate with the customs officer at the intended place of first landing or at the nearest international airport or other customs port of entry in that area and make a full report of the circumstances of the flight and of the emergency or forced landing. * * *

19 C. F. R., 1956 Supp., 10.19 (a) provides:

> (a) *Declaration required.* All articles brought into the United States by any individual shall be declared to a customs officer. The declaration may be made to a customs officer at the port of first arrival in the United States or on a train or ferry en route to the United States on which such an officer is assigned for that purpose. The declaration may be submitted to a United States customs officer stationed in a foreign country for that purpose if one is available and all the articles presented to him for inspection and clearance are within allowable exemptions.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the First Circuit, affirming a judgment of the United States District Court for Massachusetts forfeiting diamonds to the United States for failure to make declaration thereof when he arrived in the United States by airplane.

The pertinent facts are as follows:

In June 1954, petitioner, whose home is in New York (R. 24, 43), purchased in Germany airplane transportation to Gander, Newfoundland, and ultimately to Bermuda. He was not scheduled to stop in the United States (R. 23). The plane, however, overflew Gander because of adverse weather conditions and landed in Boston (R. 23). Before it landed, the purser distributed United States customs forms to the Gander passengers and told them to sign them (R. 25, 43). Under the headings on the forms entitled "Description of Articles" (Articles Obtained for Use

of and Accompanying Passengers) the purser wrote "Gander, P S G Overflew In Transit" (R. 25, 43). Petitioner corrected the spelling of his name on the form, filled in the citizenship blank as "U. S. A.," and signed the declaration at the bottom (R. 25–26, 44). Other parts of the form to the effect that the baggage consisted of personal effects and one orange were completed by a Boston Customs Inspector in petitioner's presence on information furnished by petitioner (R. 26, 44). No diamonds were declared.

Petitioner, before speaking to any of the United States customs officers, stated to employees of T. W. A. that he desired to proceed to either Canada or Newfoundland (R. 27, 45). In his conversations with customs agents he stated that he had not intended to come to the United States, that he intended to proceed by the first available transportation either to Canada in general or Newfoundland, and that he and a fellow passenger, one Hanhart, had an appointment in Newfoundland that evening (R. 28, 46). Customs agents refused to permit petitioner to proceed on transportation which the airline had arranged that morning (R. 30). Petitioner was requested to submit to an internal medical examination by a doctor of the United States Public Health Service (R. 31, 47). Petitioner claims that he refused (R. 31) but the government states that he requested that such examination be made at a hospital (R. 47). On the way to the hospital, the diamonds were discovered under the seat of the customs automobile in which they were riding (R. 48) and were then seized (R. 32). Petitioner claims that after such seizure he was

subjected to an involuntary medical examination at the hospital and was kept there against his will for several hours by the customs officers (R. 32, 48).

Before the libel for forfeiture was filed, petitioner had been acquitted on an indictment charging that he smuggled and fraudulently imported the merchandise into the United States (R. 37).

ARGUMENT

1. Petitioner argues that since his arrival in the United States was unintentional, the goods which he carried on his person should be deemed exempt from the customs laws of the United States, with the result that, despite the false statement in his declaration, the diamonds should not be deemed subject to forfeiture.

Since petitioner does not deny the power of the United Sates to make its laws applicable within its territorial jurisdiction, his entire argument is one of statutory construction. The simple answer to his elaborate contentions is, therefore, the one given by the court below, that there is nothing in either the statute or the regulations which exempts any person physically arriving in the United States from the duty to make a declaration. Nor is there any reason of policy why such persons should be exempt from that duty. So long as the person is actually here, the United States has the right to inquire as to what he has with him, if for no other reason than to make certain that he is not carrying something which might be injurious to public health. There is no issue in this case as to the imposition of a duty; the issue is merely the right to obtain information as to articles

which are physically present in the United States on a person actually here. On this, both the statute and the regulations are clear.

The statute provides "The Secretary of the Treasury is authorized to prescribe rules and regulations for the declaration and entry of—* * * (6) Articles carried on the person or contained in the baggage of a person arriving in the United States." Act of June 17, 1930, c. 497, Section 498, 19 U. S. C. 1498. Pursuant to this statute and to Section 624 (19 U. S. C. 1624), 19 C. F. R. 10.19 (*supra*, p. 4) provides that "*All articles* brought into the United States *by any individual* shall be declared to a customs officer". The absence of exception cannot be attributed to oversight. The possibility that passenger aircraft and their passengers might make wholly unexpected landings in the United States is recognized by regulation 19 C. F. R. 6.3 (g) (*supra*, p. 3) which provides for reports and clearances in that situation. The failure to provide any exemption in regulation 10.19 from the duty of "any individual" to declare "all articles" thus represents a deliberate policy of exercising the admitted power of the United States to obtain information from all persons coming within its jurisdiction.

The arguments made by petitioner to the effect that articles brought involuntarily should not be deemed imported and that the customs laws should be held to apply only to articles imported assume that the United States would have no valid reason for obtaining information as to articles accompanying a person who is actually here. But the mere fact of presence within the United States immediately makes the matter of

concern to the United States, whether to prevent evasion of the customs laws, or for reasons of public health. The right to obtain the information, therefore, cannot be limited by the ultimate destination or dutiability of the articles.

The cases cited by petitioner do not touch the specific question of the requirement of declaration of the contents of their baggage by persons arriving involuntarily, nor do they establish a general rule exempting all involuntary arrivals of persons or property from the operation of the customs statutes. Their holdings are that customs duties will not be taxed on property coming into the United States jurisdiction by *vis major* and that cargo otherwise forfeitable, *e. g.,* contraband, will be exempted from such forfeiture where the vessel arrived involuntarily. Clearly this is no blanket rule of exemption covering all customs laws in cases of unexpected arrivals of persons or property, nor does it touch the duty of declaring or making known to port authorities the character of the arriving property. No question of declaration or concealment of the nature of the property was involved in the cases petitioner cites—they concern only the imposition of duties or the right to seize. The principle of those cases is embodied in our statutory customs laws. The Act of June 17, 1930, ch. 497, Section 441 (4), as amended (19 U. S. C. 1441 (4)), exempts from the requirement of entry at the custom house "vessels arriving in distress or for the purpose of taking on bunker coal, bunker oil, sea stores, or ship's stores and which shall depart within twenty-four hours after arrival without hav-

ing landed or taken on board any passengers, or any merchandise other than bunker coal, bunker oil, sea stores, or ship's stores." As the court below points out, the limitations imposed by this statute itself show that not all involuntary arrivals are automatically exempt from all customs requirements.

As noted, there is no issue here as to the right to impose a duty. The only question is the right to obtain information. Neither the language of the statute and regulations nor the policy behind them preclude their application to this situation.

2. Petitioner's contention that the libel subjected him to double jeopardy is without merit. As the Court of Appeals noted, the issues in the two cases are not the same; the criminal indictment charged petitioner with fraudulently and knowingly smuggling the diamonds into the United States in violation of Section 497 of the 1930 Act (19 U. S. C. 1497), and of 18 U. S. C. 545. The libel is unconcerned with the intent of the traveler and concerns itself only with whether the goods were brought in without declaration. *United States* v. *20 Strings Seed Pearls,* 34 F. 2d 124 (S. D. N. Y.) Thus the holding in *Coffey v. United States,* 116 U. S. 436, that the facts ascertained in a criminal case as between the United States and a claimant could not be again litigated between them in a civil suit which was punitive in character, is inapposite, since the facts for determination in the two smuggling cases and the instant libel are different. Cf. *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 550, 551; *Helvering* v. *Mitchell,* 303 U. S. 391, 400; *Various Items of Personal Property* v.

United States, 282 U. S. 577, 581; *Stockwell* v. *United States,* 13 Wall. 531, 547, 555; *United States* v. *20 Strings Seed Pearls, supra.* Petitioner's argument that intent is part of the forfeiture proceeding is merely a rephrasing of his argument, discussed above, that no declaration should have been required.

3. Similarly, the contention that the diamonds were illegally secured depends on petitioner's position that he was not subject to the customs laws. If he was, it was reasonable to request that he permit a physical examination. The diamonds were discovered on the way to the hospital to which petitioner was being taken at his request. Nothing in the record suggests that the officers acted outside the scope of the broad powers of search conferred by the customs statutes and recognized by the courts. 19 U. S. C. 482, 1581, 1582; *Boyd* v. *United States,* 116 U. S. 616, 623.

CONCLUSION

For the reasons given it is respectfully submitted that the petition for a writ of certiorari should be denied.

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